

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TIM and PENNY PATERSON,

Plaintiffs,

v.

LITTLE, BROWN AND COMPANY, TIME  
WARNER BOOK GROUP, HAROLD  
EVANS ASSOCIATES LLC, HAROLD  
EVANS, and DAVID LEFER,

Defendants.

No. C05-1719Z

ORDER

This matter comes before the Court on Motion for Summary Judgment, docket no. 13, by Defendants Little, Brown & Co. (“Little Brown”), Time Warner Book Group (“Time Warner”), Harold Evans Associates LLC (“Harold Evans Associates”), Sir Harold Evans, and David Lefer (collectively “Defendants”). The Court has considered the Defendants’ Motion for Summary Judgment, docket no. 13, Plaintiffs’ Response, docket no. 20, Defendants’ Reply, docket no. 22, and the various supporting declarations and exhibits filed by the Parties. The Court heard Oral Argument on Monday, July 2, 2007, and took the matter under advisement. The Court now being fully informed hereby GRANTS the

1 Defendants' Motion for Summary Judgment, docket no. 13, and dismisses Plaintiffs'  
2 Complaint.

3 In 2004, Little Brown & Co.<sup>1</sup> published a series of essays on American inventors and  
4 innovators. The essays were written by Sir Harold Evans, and the book was titled They  
5 Made America: From the Steam Engine to the Search Engine: Two Centuries of Innovators.  
6 Among its profiles of American inventors, the book included a chapter titled "Gary Kildall:  
7 He saw the future and made it work. He was the true founder of the personal computer  
8 revolution and the father of PC software." Das Decl., docket no. 14, Ex. B (the "Kildall  
9 chapter"). The Kildall chapter details the life and work of Gary Kildall, a pioneer in  
10 personal computing, and focuses on his creation of the CP/M microcomputer operating  
11 system in the 1970s. In recounting the significance of Kildall's life and work, and noting his  
12 role as the "father of PC Software," the book considers Bill Gates, Microsoft, the MS-DOS  
13 operating system, and their relation to Kildall's CP/M operating system.

14 Plaintiff Tim Paterson created an early computer operating system called "QDOS," or  
15 "86-DOS," that would ultimately be purchased by Microsoft and sold by IBM as "PC-DOS,"  
16 and by Microsoft as "MS-DOS," or simply "DOS." At issue in this defamation case is  
17 Evans' discussion of Paterson's reliance on CP/M in creating DOS. Evans contends, in the  
18 Kildall chapter, that Paterson "[took] a ride on" Kildall's operating system, appropriated the  
19 "look and feel" of the CP/M operating system, and copied much of his operating system  
20 interface from CP/M. Das Decl., docket no. 14, Ex. B at 412-13.

21 Paterson contends that statements in the book are false and defamatory. See Compl.,  
22 docket no. 1, ¶ 1.5. Paterson also asserts a claim for false light invasion of privacy based on  
23 the book's allegedly false statements. Id. ¶¶ 2.1-2.4.

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<sup>1</sup> Little, Brown & Co. is an imprint of Time Warner Book Group.

1 **A. Background: CP/M, QDOS, 86-DOS, and MS-DOS**

2 In 1973, Gary Kildall created CP/M, which stood for “Control Program/Monitor.”  
 3 CP/M was an operating system for microcomputers. In 1974, Kildall founded Intergalactic  
 4 Digital Research (shortened to Digital Research, Inc., or DRI) to sell his operating system.  
 5 Das Decl., docket no. 14, Ex. C (John Markoff, Gary Kildall, 52, Crucial Player In Computer  
 6 Development, Dies, N.Y. Times, July 13, 1994, at D19). By the late 1970s, CP/M had  
 7 become the standard operating system for the first generation of 8-bit microcomputers,  
 8 including Intel’s 8-bit chip, the 8080, and a competing 8-bit chip, the Zilog Z80. Id., Ex. C,  
 9 Ex. E (Tim Paterson, The Right Place . . . The Right Time, at 33 (unpublished)).

10 In 1978, Intel introduced its 16-bit chip, the 8086. Das Decl., docket no. 14, Ex. F  
 11 (Microsoft Press, The MS-DOS Encyclopedia, at 11 (Ray Duncan ed. 1988)). While  
 12 working at Seattle Computer Products in 1979, Paterson designed a central processing unit  
 13 (“CPU”) card that incorporated the Intel 8086 chip. Id. at 12. During this period, Digital  
 14 Research was developing a 16-bit version of CP/M, generally referred to as CP/M-86,  
 15 designed to run on the Intel 8086. However, CP/M-86 was still unavailable in April 1980,  
 16 and Seattle Computer Products decided to develop its own 16-bit operating system.

17 Both Paterson (working on QDOS) and Rod Brock knew that a standard  
 18 operating system for the 8086 was mandatory if users were to be  
 19 assured of a wide range of application software and languages. CP/M  
 20 had become the standard for 8-bit machines, so the ability to  
 21 mechanically translate existing CP/M applications to run on a 16-bit  
 system became one of Paterson’s major goals for the new operating  
 system. To achieve this compatibility, the system [Paterson] developed  
 mimicked CP/M-80’s functions and command structure, including its  
 use of file control blocks (FCBs) and its approach to executable files.

22 Id. at 12. At the same time, however, Paterson rejected CP/M’s system for file  
 23 allocation, which was inefficient for large disks, and instead used a file allocation  
 24 table (“FAT”), as Microsoft had done with its own M-DOS and stand-alone disk  
 25 BASIC. Id. at 13.

Paterson and Seattle Computer Products (“SCP”) proceeded with development in two phases. First, Paterson developed a “quick and dirty operating system,” nicknamed “QDOS,” to fill the immediate need for SCP’s computer. Paterson Decl., docket no. 20-4, ¶ 4. Second, Paterson worked to create a “much more refined operating system” that would ultimately be made available in single-user and multi-user versions. *Id.* Paterson’s primary objective for his version of DOS was to make it “as easy as possible for software developers to write applications for it . . . .” *Id.* ¶ 5. He therefore developed an application program interface (“API”) that was compatible with CP/M, and enabled the automatic translation of 8-bit programs into 16-bit programs. *Id.* Translation compatibility was the “primary design requirement” in Paterson’s development of an operating system for the 8086. *Id.* ¶ 6.

#### **1. Translation Compatibility.**

In order for Paterson’s DOS to be “translation compatible” with Kildall’s CP/M, the numbers assigned to any given function, the registers used to pass data, and the memory structures used to pass information all needed to be identical as between DOS and CP/M. *See* Das Decl., docket no. 14, Ex. A (Paterson Dep. at 50:25 - 51:5). For Paterson, “[s]tep one was to write down what CP/M-80 did.” Das Decl., docket no. 14, Ex. L (David Hunter, Tim Paterson: The Roots of DOS, Softalk for the IBM Computer, March 1983). Translation compatibility allowed programs for Intel’s 8080, which ran on CP/M, to run under DOS:

“Once you translated these programs, my operating system would take the CP/M function after translation and it would respond in the same way,” said Paterson. “To do this did not require ever having CP/M. It only required taking Digital’s manual and writing my operating system. And that’s exactly what I did. I never looked at Kildall’s code, just his manual.”

Das Decl., docket no. 14, Ex. G (James Wallace & Jim Erickson, Hard Drive: Bill Gates and the Making of the Microsoft Empire 185 (John Wiley & Sons, Inc. 1992)).

In a letter to the editor of Microprocessor Report in 1994, Paterson further described the relationship and compatibility between CP/M and DOS, and his reasons for ensuring compatibility between the two:

1 SCP was a small company with no clout in the industry. To get major  
 2 software developers to port their products from the 8080/Z80 to the  
 3 8086, I decided we had to make it as easy as possible. I had already  
 4 written a Z80-to-8086 source code translator (hosted on the 8080 and  
 5 CP/M). My plan was that running an 8080 CP/M program through the  
 6 translator would be the only work required by software developers to  
 7 port the programs to the 8086. In other words, the interface used by the  
 8 applications to request operating system services would be exactly the  
 9 same as CP/M's after applying the translation rules.

10 So 86-DOS generally had all the same application-visible elements as  
 11 CP/M—the function codes, the entry point address, part of the File  
 12 Control Block layout, etc. I used the 1976 CP/M Interface Guide for  
 13 my description of the requirements. I also provided some similar  
 14 commands from the console such as DIR, RENAME, ERASE--although  
 15 any system would have such functions, regardless of name chosen.

16 Das Decl., docket no. 14, Ex. J (Tim Paterson, The Origins of DOS: DOS Creator Gives His  
 17 View of Relationship Between CP/M, MS-DOS, Microprocessor Report, Oct. 3, 1994, Letter  
 18 to the Editor). Paterson's DOS was designed to mimic CP/M-80 in both "functions available  
 19 and style of operation":

20 [t]he structures of 86-DOS's file control blocks, program segment  
 21 prefixes, and executable files were nearly identical to those of CP/M-80.

22 Das Decl., docket no. 14, Ex. D (Ray Duncan, Advanced MS-DOS Programming 4  
 23 (Microsoft Press 1986)).<sup>2</sup>

## 24 **2. Controversy and Commentary.**

25 Even before IBM unveiled the IBM Personal Computer, the industry began to note  
 26 similarities between DOS and CP/M. Infoworld commented in 1981, even before the release

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27 <sup>2</sup> One district court has commented on the relationship between QDOS and CP/M in the  
 28 context of litigation between Caldera, Inc. and Microsoft.

29 In 1981, Microsoft first licensed and later purchased for a reported \$50,000  
 30 a 16-bit CP/M clone from Seattle Computer Products, a small original  
 31 equipment manufacturer (OEM). This system, named QDOS (Quick and  
 32 Dirty Operating System), mirrored the functionality of CP/M.

33 Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1298 (D.Utah 1999). However, the  
 34 commentary was not a factual finding, but merely background for the parties' dispute over DR  
 35 DOS, MS-DOS, and Microsoft's business practices. The above quotation from the opinion  
 36 included no citation to the record.

of the IBM PC, that the operating system for IBM's new computer "will be similar to CP/M in many respects." Das Decl., docket no. 14, Ex. S (InfoWorld Staff, IBM to Pounce on Micro Market, June 8, 1981). In the years that followed, however, commentary on Paterson's DOS would become increasingly critical, with regard to its similarities with CP/M. As evidence of an ongoing public debate over the so-called "paternity" of DOS, Defendants cite various authors and commentators, as well as writings by Gary Kildall and Tim Paterson.

- DOS was a "a CP/M-look-alike operating system." Das Decl., docket no. 14, Ex. U (Kevin Strehlo, Microsoft Expands, Weighs Dependence Against Autonomy, PC Week, Sept. 1984).
- "The operating system that Gates and Microsoft developed for IBM was modelled [sic] on CP/M," and QDOS "retained many of the basic features of CP/M." "Some of the most annoying aspects of DOS, such as the eight-character file name limit, the silent A>, and the lack of any confirmation upon erasing a file, are direct imports from CP/M." *Id.*, Ex. V (Randy Dykhuis, DOS 4.0: Time to Upgrade?, Computers in Libraries, June 1990).
- "Paterson set out to clone CP/M. The result was what he called QDOS—Quick and Dirty Operating System." *Id.*, Ex. H (Stephen Manes & Paul Andrews, Gates: How Microsoft's Mogul Reinvented an Industry-and Made Himself the Richest Man in America 157-58 (Doubleday 1993)).
- "MS-DOS itself started out as a clone of the CP/M operating system from DRI." "Somewhat understandably, Digital Research was upset when it found that Microsoft's new operating system for the IBM PC was a clone of CP/M." "There is no question about MS-DOS's large-scale borrowing from CP/M." "So MS-DOS began life as an enhanced clone of CP/M." *Id.*, Ex. I (Andrew Schulman et al., Undocumented DOS: A Programmer's Guide to Reserved MS-DOS Functions and Data Structures 181-82 (Addison-Wesley 1994)).
- "Through all of this, Kildall remained the gentleman. He repeatedly declined to follow the advice of those who would have him act against Microsoft despite the tales that the Redmond giant had infringed on his patents, or that it had borrowed a bit too heavily from CP/M's code in the beginning." *Id.*, Ex. X (Wayne Rash Jr., A Requiem for the Father of Modern Operating Systems, InternetWeek, July 25, 1994).
- "Tim Paterson had written a program called QDOS that Kildall always believed was copied largely from CP/M. While Paterson has strongly denied those allegations, such practices were fairly common at the time." *Id.*, Ex. Y (Rory J. O'Connor, Farewell to Troubled Genius: Kildall's Work Overshadowed by Rival, San Jose Mercury News, July 31, 1994, at 1A).

- 1 ■ QDOS “was pretty much a CP/M clone, but it ran on the 16-bit 8086 CPU.”  
2 Id., Ex. Z (Stan Veit, Whatever Happened To . . . Gary Kildall? CP/M Disk  
Operating System Developer, Computer Shopper, Nov. 1994).
- 3 ■ “QDOS, which stood for ‘quick and dirty operating system,’ was a 16-bit clone  
4 of CP/M intended for an 8086-based computer being developed by the small  
5 company. All QDOS commands were the same as in CP/M. Paterson  
6 admitted to a little ‘low-level borrowing’ from CP/M, too, but claimed that  
7 most of the code was his own.” Id., Ex. AA (Robert X. Cringley, Accidental  
Empires at 133 (Harper Business 1996 ed.)).
- 8 ■ QDOS “was an obvious CP/M knockoff . . . Paterson admitted that he had  
9 written QDOS with a CP/M manual at his side, intentionally mimicking key  
10 components to ease the task of developers accustomed to its popular  
11 predecessor (while at the same time improving on the original).” Id., Ex. BB  
12 (Gary Rivlin, The Plot to Get Bill Gates 34 (Time Books 1999)).
- 13 ■ “Paterson’s SCP-DOS operating system was a close but crude imitation of  
14 CP/M.” Id., Ex. CC (Paul Freiberger & Michael Swaine, Fire in the Valley  
15 334 (McGraw Hill 2d ed. 2000)).
- 16 ■ “Q-DOS was basically a rip-off of Kildall’s CP/M, but Kildall had never gotten  
17 around to suing.” Id., Ex. DD (Garrett Romaine, Two Books on Silicon  
18 Valley, Technical Communications, Feb/Mar. 2000, at 111).

19 Paterson has publicly responded on various occasions to allegations that DOS was a “copy”  
20 or a “clone” of CP/M, arguing that he never viewed Kildall’s source or binary code during  
21 his creation of DOS. He has written articles and features regarding his work on DOS.

22 Paterson was quoted in an article for Softalk in March 1983, where he described his  
23 approach to writing DOS. Das Decl., docket no. 14, Ex. L (David Hunter, Tim Paterson:  
24 The Roots of DOS, Softalk for the IBM Computer, March 1983).

25 “Step one was to write down what CP/M-80 did. Step two was to  
26 design a file system that was fast and efficient.”

Id., Ex. L (quoting Paterson). Paterson also was quoted on design decisions made for DOS,  
with regard to CP/M:

“IBM wanted CP/M prompts. It made me throw up.” But when IBM  
asks, you comply if you’re a lowly programmer, and that is what  
Paterson did.

Id., Ex. L (quoting Paterson). Mr. Paterson wrote an article for Byte magazine regarding the  
origins of DOS. See Das Decl., docket no. 14, Ex. K (Tim Paterson, An Inside Look at



1 MS-DOS: The Design Decisions Behind the Popular Operating System, Byte, June 1983).

2 Paterson commented:

3           The primary design requirement of MS-DOS was CP/M-80 translation  
4           compatibility, meaning that if an 8080 or Z80 program for CP/M were  
5           translated for the 8086 according to Intel's published rules, the program  
6           would execute properly under MS-DOS.

7 Id. at 230. Mr. Paterson was interviewed by the authors of Hard Drive: Bill Gates and the  
8 Making of the Microsoft Empire, who reported that Paterson said:

9           "Once you translated these programs, my operating system would take  
10          the CP/M function after translation and it would respond in the same  
11          way," said Paterson. "To do this did not require ever having CP/M. It  
12          only required taking Digital's manual and writing my operating system.  
13          And that's exactly what I did. I never looked at Kildall's code, just his  
14          manual."

15 Das Decl., docket no. 14, Ex. G, at 185. Paterson also described a telephone conversation in  
16 which Kildall accused him of ripping off CP/M:

17           "At the time," said Paterson, "I told him I didn't copy anything. I just  
18           took his printed documentation and did something that did the same  
19           thing. That's not by any stretch violating any kind of intellectual  
20           property laws. Making the recipe in the book does not violate the  
21           copyright on the recipe. I'd be happy to debate this in front of anybody,  
22           any judge."

23 Id., Ex. G, at 184 (quoting Tim Paterson).

## 24 DISCUSSION

25           Summary judgment is appropriate where there is no genuine issue of material fact and  
26           the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The  
          moving party bears the initial burden of demonstrating the absence of a genuine issue of  
          material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party  
          has met this burden, the opposing party must show that there is a genuine issue of fact for  
          trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The  
          opposing party must present significant and probative evidence to support its claim or  
          defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir.  
          1991).



In order to defeat a motion for summary judgment, the non-moving party must make more than conclusory allegations, speculations, or argumentative assertions that material facts are in dispute. Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994). Moreover, in ruling on a motion for summary judgment, the Court may only consider evidence that would be admissible at trial, and may not consider inadmissible hearsay. Key Bank of Puget Sound v. Alaskan Harvester, 738 F. Supp. 398, 401 (W.D. Wash. 1989). For purposes of summary judgment, reasonable doubts as to the existence of material facts are resolved against the moving party and inferences are drawn in the light most favorable to the opposing party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). However, where no *factual* showing is made in opposition to a motion for summary judgment, the district court is not required to search the record *sua sponte* for some genuine issue of material fact. See Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1029 (9th Cir. 2001).

#### **A. Defamation**

Competing interests underlie all defamation cases: the protections of the First Amendment compete with the protection of an individual's reputation under State defamation law. The tension has been described as follows:

[Cases] establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."

Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990). A defamation allegation involving a written work of authorship necessarily involves consideration of state defamation law weighed against the protections of the First Amendment.

A defamation plaintiff must prove four elements to make out a claim for defamation: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. Mark v. Seattle Times, 96 Wn.2d 473, 486 (1981). When a defendant in a defamation action moves for

summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements. LaMon v. Butler, 112 Wn.2d 193, 197 (1989). The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists. Id. (citing Herron v. Tribune Pub’g Co., 108 Wn.2d 162, 170 (1987)). Summary judgment plays a “particularly important role” in defamation cases:

Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.

Mark, 96 Wn.2d at 485 (internal quotations omitted). Defendants urge that Plaintiff cannot present a prima facie case for defamation and ask the Court to grant summary judgment in their favor.

### **1. Truth and Privilege.<sup>3</sup>**

It is for the Court to determine whether a statement is capable of defamatory meaning. Hoppe v. Hearst Corp., 53 Wn.App. 668, 672 (1989). “Defamatory meaning may not be imputed to true statements.” Lee v. The Columbian, Inc., 64 Wn.App. 534, 538 (1991). Put differently, the truth is an absolute defense to a claim of defamation. Ward v. Painters’ Local Union No. 300, 41 Wn.2d 859, 865 (1953).

[A] defamation defendant need not prove the literal truth of every claimed defamatory statement. A defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the “sting,” is true.

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<sup>3</sup> Plaintiff takes great offense at the allegation that Paterson bodily copied Kildall’s code: the “gravest of Evans’ defamatory statements about Mr. Paterson was that Paterson somehow took Kildall’s software code and copied it bodily.” See Response, docket no. 20, at 11. However, Plaintiff fails to identify where Evans makes this allegation, see id. at 11-14, and the Court is unable to locate such an allegation. Evans recounts various allegations that Paterson “appropriat[ed] the ‘look and feel’” of CP/M, and “cop[ied] most of the top part of Kildall’s operating system,” “took almost unaltered Kildall’s Int-21 mechanism . . .” and “copied Kildall’s first 36 Int-21 functions into QDOS.” However, the Court finds no allegation that Paterson “cop[ied] verbatim vast swaths of Kildall’s code,” as Plaintiff maintains.

1 Camer v. Seattle Post-Intelligencer, 45 Wn.App. 29, 38 (1986) (affirming grant of summary  
2 judgment in favor of defendant where news story referred to plaintiffs as “nuisance suers”).  
3 Similarly, whether a statement constitutes an actionable statement of defamatory fact or a  
4 statement of non-actionable opinion is an issue of law for the Court. See id. (“[E]xpressions  
5 of opinion are protected under the First Amendment.”); but cf. Levinsky’s, Inc. v. Wal-Mart  
6 Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997) (“[a] statement couched as an opinion that  
7 presents or implies the existence of facts which are capable of being proven true or false can  
8 be actionable.”) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990)). Before  
9 the truth or falsity of an allegedly defamatory statement can be assessed, the plaintiff must  
10 prove that the words constituted a statement of fact, not an opinion. Robel v. Roundup  
11 Corp., 148 Wn.2d 35, 55 (2002).

12 Because “expressions of opinion are protected under the First Amendment,” they “are  
13 not actionable.” Camer, 45 Wn.App. at 39 (citing Gertz v. Robert Welch, Inc., 418 U.S.  
14 323, 339 (1974) (“[u]nder the First Amendment there is no such thing as a false idea”)). As  
15 a threshold determination, the Court must determine whether the allegedly defamatory words  
16 were intended as a statement of fact or an expression of opinion. Id. (“The determination of  
17 whether a communication is one of fact or opinion is a question of law for the court.”).

18 Camer considered allegations against the Seattle Post-Intelligencer, which had  
19 referred to plaintiffs as “nuisance suers.” In affirming the trial court’s grant of summary  
20 judgment, the Court noted:

21 In considering the article as a whole, it is evident that the tone is one of  
22 opinion. Virtually every statement cited as defamatory by Camer and  
23 Coughlin is an opinion of one of the quoted attorneys that the lawsuits  
24 are frivolous and a nuisance. One cannot determine the truth or falsity  
25 of statements such as “[t]he cases have become something of a joke” or  
26 “[w]hat these people do is hammer us with absolute nonsense you have  
to respond to”. Nor do the statements that the suits are “frivolous” and  
constitute a “nuisance” imply the allegation of undisclosed defamatory  
facts as their basis.

1 Camer, 45 Wn.App. at 39. In considering whether statements should be taken literally as  
 2 statements of fact, or as opinion, the Court must consider the “totality of the circumstances”  
 3 surrounding those statements. See Robel, 148 Wn.2d at 55-56 (citing Dunlap v. Wayne, 105  
 4 Wn.2d 529, 539 (1986)). The Court should consider, at a minimum, the medium and  
 5 context, the audience, and whether the statement implies “undisclosed facts.” Id.<sup>4</sup>  
 6 Defendants contend the “sting” of the Kildall chapter is true, and that the individual  
 7 statements are “indisputably true” or constitute non-actionable, privileged opinion.

8 Paterson’s first allegation is that “Defendant Evans asserted that Mr. Kildall was the  
 9 ‘inventor’ of DOS,” which Paterson claims is false. See Response, docket no. 20, at 4. The  
 10 Court has been unable to find such an assertion in the Kildall chapter. Accordingly, the  
 11 Court considers the allegedly false statements cited in the Complaint, and cited in the Kildall  
 12 chapter.

13 **a. Statement No. 1.**

14 Paterson did it by taking a ride on Kildall’s system with a program he  
 15 officially called “Seattle DOS,” but which he also called QDOS, for  
 16 Quick ‘n’ Dirty Operating System. Kildall writes: “Paterson’s Seattle  
 17 DOS was yet another one of the rip-offs of the CP/M design. The CP/M  
 18 machine code was taken apart, using CP/M’s own DDT [its debugger],  
 19 to determine the internal workings of CP/M in order to make a clone of  
 20 CP/M operation.” Paterson has denied using CP/M source code but  
 21 admits making the two systems similar to help translate program into  
 22 QDOS. *“Because of the completely different file-storage format, none  
 23 of the internal workings has any corresponding relation to anything  
 24 within CP/M,” Paterson says.*<sup>5</sup>

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21 <sup>4</sup> The D.C. Circuit has considered another formulation in evaluating of the “totality of the  
 22 circumstances” to determine whether a statement is fact or opinion: (1) “the specific language  
 23 used”; (2) “whether the statement is verifiable”; (3) “the general context of the statement”; and  
 24 (4) “the broader context in which the statement appeared.” Ollman v. Evans, 750 F.2d 970, 979  
 25 (D.C. Cir. 1984) (en banc) (affirming grant of summary judgment that statements as to the  
 26 “appointment of a Marxist” at University of Maryland, with an avowed “desire to use the  
 classroom as an instrument for preparing what he calls ‘the revolution’” were nonactionable  
 opinion); see also Milkovich v. Lorain Journal Co. 497 U.S. 1, 8-9 (1990) (holding that the  
 implied assertion that high school coach perjured himself in judicial proceeding was sufficiently  
 factual to be susceptible of being proved true or false).

<sup>5</sup> The alleged defamatory statements in the Kildall chapter are analyzed and numbered  
 according to the allegations in the Complaint, docket no. 1. Included in italics are additional

1 Compl., docket no. 1, ¶ 1.4.a; see Das Decl., Ex. B. Defendants urge that the truth of the  
 2 statements is an absolute defense to Paterson's claim of defamation, based on Paterson's own  
 3 statements. Defendants also contend that words and phrases like "rip-off" and "taking a ride  
 4 on" have been rejected as defamatory due to their imprecise meaning, and are therefore  
 5 incapable of defamatory meaning.

6 A statement must be provably false before there can be liability for defamation.<sup>6</sup>  
 7 Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990); see also Phantom Touring, Inc.  
 8 v. Affiliated Publications, 953 F.2d 724, 728 (1st Cir. 1992) ("a rip-off, a fraud, a scandal, a  
 9 snake-oil job was mere hyperbole and, thus, protected opinion"); Spelson v. CBS, Inc., 581  
 10 F. Supp. 1195 (N.D. Ill. 1984) (cited with approval by Camer, 45 Wn.App. at 40-41)  
 11 (expressions such as "unethical," "cancer con-artists," "cancer quacks," and "fraud" were  
 12 constitutionally protected statements of opinion); see also Dunlap, 105 Wn.2d at 539-41  
 13 (characterization of request for \$10,000 "finder's fee" as a "solicitation of kick-backs" was  
 14 non-actionable opinion).

15 Phantom Touring considered an article which noted that the plaintiff's musical  
 16 comedy production was not the same as the widely acclaimed Broadway show of the same  
 17 name, and termed it "a rip-off, a fraud, a scandal, a snake-oil job." 953 F.2d at 728.

18 Not only is this commentary figurative and hyperbolic, but we also can  
 19 imagine no objective evidence to disprove it. Whether appellant's  
 20 "Phantom" is "fake" or "phony" is similarly unprovable, since those  
 21 adjectives admit of numerous interpretations.

22 Id.; see also McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987) (holding that discussion  
 23 of interactions with timeshare salespeople, together with conclusion that it was a "scam,"  
 24 was opinion protected by the First Amendment). "The lack of precision [in the meaning of

25 \_\_\_\_\_  
 relevant portions of the text, which are necessary for context.

26 <sup>6</sup> A person who republishes a defamatory statement may still be liable for defamation,  
 even if the author is careful to ascribe the statements to the original speaker. Auvil v. CBS 60  
Minutes, 800 F. Supp. 928, 931 (E.D. Wash. 1992).

1 the word ‘scam’] makes the assertion ‘X is a scam’ incapable of being proven true or false.”  
 2 McCabe, 814 F.2d at 842.

3 Based on a discussion of disclosed facts in the Kildall chapter, including the writings  
 4 of Gary Kildall, Evans concluded that Paterson “ripped-off” CP/M. Evans concluded that  
 5 Paterson created DOS “by taking a ride on Kildall’s system,” and that “Seattle DOS was yet  
 6 another one of the rip-offs of the CP/M design.”<sup>7</sup> However, every negative statement about a  
 7 person is not defamation.<sup>8</sup> The Court finds that Evans’ statements that Paterson “ripped-off”  
 8 CP/M, or “[took] a ride on” CP/M, are mere opinion based on the facts disclosed in the  
 9 Kildall chapter. Just like rip-off, fraud, scandal, and snake-oil job in Phantom Touring, and  
 10 scam in McCabe, the allegedly defamatory words in this statement are imprecise hyperbole,  
 11 incapable of defamatory meaning. Evans fully discloses the basis for his statements in the  
 12 Kildall chapter, and Paterson’s dislike for Evans’ conclusions does not make them  
 13 defamatory.

14 The second part of the statement quotes actual statements from Kildall and Paterson  
 15 on their dispute over whether Paterson actually misappropriated CP/M’s code:

16 Kildall writes: “. . . The CP/M machine code was taken apart, using  
 17 CP/M’s own DDT [its debugger], to determine the internal workings of  
 18 CP/M in order to make a clone of CP/M operation.” Paterson has  
 19 denied using CP/M source code but admits making the two systems  
 20 similar to help translate program into QDOS. “*Because of the*  
 21 *completely different file-storage format, none of the internal workings*  
 22 *has any corresponding relation to anything within CP/M,” Paterson*  
 23 *says.*

---

23 <sup>7</sup> One definition of “rip-off” proffered by Defendants is “[s]omething, as a story or film,  
 24 that is clearly imitative or based on something else.” See WEBSTER’S II NEW COLLEGE  
 25 DICTIONARY 956 (1999). Paterson’s own statements concede that 86-DOS was imitative of, or  
 based on, Kildall’s CP/M. See, e.g., Das Decl., docket no. 14, Ex. L (David Hunter, Tim  
Paterson: The Roots of DOS, Softalk for the IBM Computer, March 1983) (“Step one was to  
 write down what CP/M-80 did.”).

26 <sup>8</sup> “Snitch,” “squealer,” and “liar,” may constitute “abusive opinion,” which is nonetheless  
 not actionable as defamation. Robel, 148 Wn.2d at 56.

1 Das Decl., Ex. B.<sup>9</sup> Defendants argue this section is non-actionable opinion protected by the  
 2 First Amendment, even if factually incorrect, because it presents both Kildall's accusation  
 3 and Paterson's denial. Indeed, Paterson has repeatedly denied any access to CP/M code, in  
 4 any form, during his creation of DOS. See Paterson Decl., docket no. 20-4, ¶¶ 14-16 ("I  
 5 never used a debugger . . . . I never saw CP/M source code. I never saw CP/M binary  
 6 code.").

7 Evans included Paterson's denial, as part of the chapter, immediately following  
 8 Kildall's accusation.

9 [W]hen an author outlines the facts available to him, thus making it  
 10 clear that the challenged statements represent his own interpretation of  
 11 those facts and leaving the reader free to draw his own conclusions,  
 12 those statements are generally protected by the First Amendment.

13 Partington v. Bugliosi, 56 F.3d 1147, 1156-57 (9th Cir. 1995). Evans' discussion of the use  
 14 of CP/M code devotes near equal time to Paterson's denials and Kildall's allegations.

15 A simple expression of opinion based on disclosed or assumed  
 16 nondefamatory facts is not itself sufficient for an action of defamation,  
 17 no matter how unjustified and unreasonable the opinion may be or how  
 18 derogatory it is.

19 Dunlap, 105 Wn.2d at 540.

20 Evans' reproduction of Kildall's statements in the course of presenting both sides of  
 21 the argument is thus protected by the First Amendment. The inclusion of cautionary  
 22 language (i.e. "Kildall writes . . ." and "Paterson has denied . . .") weakens any inference that  
 23 the author knows "undisclosed facts," and further discounts the statements as opinion.  
 24 Ollman, 750 F.2d at 982-83. Evans' reproduction of both sides of the argument presents  
 25 Kildall's perspective and Paterson's denials as competing allegations, and is not actionable  
 26 as defamation because it is protected by the First Amendment.

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<sup>9</sup> The italicized portion is included for context.



1           **b.       Statement No. 2.**

2           John Wharton, the former Intel engineer and computer specialist who  
3           became a friend of Kildall's neatly sums up the ethics of that: "I can  
4           empathize somewhat with the bind in which SCP found itself: unable to  
5           sell its 8086 hardware for lack of software and unable to buy the  
6           software it wanted. But for Mr. Paterson to cite the unavailability of  
7           CP/M-86 as justification for appropriating the 'look and feel' of a  
8           competing operating system and its utilities seems to me analogous to  
9           telling a judge, 'I needed the car, Your Honor, and the plaintiff wouldn't  
10          sell me his, so I was forced to take it.'"

11          Compl., docket no. 1, ¶ 1.4.b. This second allegedly defamatory statement was written by  
12          John Wharton in 1994, in response to Paterson's criticism of his Tribute to Gary Kildall. See  
13          Das Decl., docket no. 14, Ex. J (Tim Paterson, The Origins of DOS: DOS Creator Gives His  
14          View of Relationship Between CP/M, MS-DOS, Microprocessor Report, Oct. 3, 1994, Letter  
15          to the Editor).

16          Plaintiff urges that Wharton's analogy "implies not only that an entire car was taken,  
17          but that it was stolen." See Response, docket no. 20, at 12. However, defamation must  
18          follow a statement that expresses or implies provable facts. See Schmalenberg v. Tacoma  
19          News, Inc., 87 Wn.App. 579, 590-91 (1997). In this instance, what Paterson claims as  
20          "translation compatibility" (a primary design requirement for DOS), see Paterson Decl.,  
21          docket no. 20-4, ¶ 6, Wharton claims is the "look and feel" of CP/M.

22          Plaintiff's attempts to explain away the similarities between DOS and CP/M as a  
23          necessary component weakens his defamation argument:

24                 Translation compatibility, a goal that Mr. Paterson admits to having,  
25                 was required in order to allow programmers to translate their 8 bit  
26                 programs into 16 bit programs that would operate on the operating  
                    system. *Mr. Paterson could just as easily labeled the actions as*  
                    *something else, but he would have run the risk that programmers,*  
                    *unwilling to start from scratch with another set of labels, would not*  
                    *adapt their programs to the operating system.*

27          Response, docket no. 20, at 12:11-15 (emphasis added). Evans merely repeats Wharton's  
28          opinion of Paterson's choice to "label[] the actions" just like CP/M for the sake of  
29          "translation compatibility." Wharton urged this was "appropriating the 'look and feel'" of

1 CP/M; Paterson says it was necessary for the success of his DOS, for “translation  
2 compatibility.”

3 Wharton believed the appropriation was akin to taking a car without permission.  
4 More important than the characterization, however, is Evans inclusion of both sides of the  
5 debate. Indeed, Evans’ quotation of Wharton’s analogy would be meaningless without  
6 supporting facts. Wharton’s analogy might have been phrased differently, but Evans cannot  
7 be expected to recast historical statements in public debate for purposes of the Kildall  
8 chapter. Evans’ reprinting of the statement that Paterson appropriated the “look and feel” of  
9 CP/M, and the “I needed the car” analogy is not defamatory. The statements are not  
10 provably false, they are not defamatory, and writing on the debate is protected by the First  
11 Amendment.

12 **c. Statement Nos. 3, 4.**

13 “. . . Paterson’s adaptation of Kildall’s system . . .”  
14 Compl., docket no. 1, ¶ 1.4.c.

15 “. . . Paterson’s version of Kildall’s program . . .”  
16 Compl., docket no. 1, ¶ 1.4.d.

17 Defendants argue that these statements are non-actionable opinion, based in part on  
18 Microsoft CEO Steve Ballmer’s one-time statement that “Tim Patterson’s [sic] operating  
19 system . . . was, well, adapted from Gary Kildall’s CP/M.” See Das Decl., docket no. 14,  
20 Ex. T (Triumph of the Nerds: The Transcripts, Part II, available at [http://www.pbs.org/nerds/](http://www.pbs.org/nerds/part2.html)  
21 [part2.html](http://www.pbs.org/nerds/part2.html), at HGB000699). Much like Kildall’s statements that Paterson’s DOS was a “rip-  
22 off” of Kildall’s system, these statements merely convey Evans’ sarcastic opinion that  
23 Paterson’s DOS was merely a “version” or “adaptation” of CP/M. The statements  
24 themselves are incapable of being proved false: they are an expression of Evans’ opinion that  
25 DOS was so closely akin to CP/M that it could be called a “version” or “adaptation” of the  
26 latter. Biting commentary of this type (i.e., commentary on disclosed facts) is the hallmark

1 of First Amendment protection. The statements convey opinion based on discussed and  
2 disclosed facts, and are incapable of defamatory meaning.

3 **d. Statement Nos. 5, 6.**

4 What Paterson essentially had done was rewrite the bottom part of the  
5 software – improving the way files were stored and adapting the  
6 program to a 16-bit machine – while copying most of the top part of  
7 Kildall’s operating system (the Int-21 commands that allowed the  
8 operating system to interact with the application program). Even if  
9 QDOS and CP/M were 80 percent different, as Paterson has said, he  
10 took almost unaltered Kildall’s Int-21 mechanism – the heart of his  
11 innovation. An independent examination of the two systems shows  
12 some blatant copies, some slight alterations. *For instance, CP/M began  
13 each new line with:*

14 A:

15 *The DOS prompt was:*

16 A>

17 Paterson copied Kildall’s first 36 Int-21 functions into QDOS. *He did  
18 rename Kildall’s “Read Sequential” function “Sequential Read”;  
19 “write sequential” became “sequential write”; “Read Random” was  
20 called “Random Read.” And so on.*

21 *In addition, CP/M’s ED program was almost the same as PC-DOS’s  
22 EDLIN editor program.*<sup>10</sup>

23 Compl., docket no. 1, ¶ 1.4.e-f; see also Das Decl., Ex. B. Paterson argues the Evans’  
24 contention that Paterson “took almost unaltered Kildall’s Int-21” is false and defamatory,  
25 because “Mr. Kildall did not have an Int-21 mechanism in his CP/M software.” See  
26 Response, docket no. 20, at 10; see also Hollaar Decl., docket no. 20-3, ¶¶ 11-12.

Through the Hollaar Declaration, the Plaintiff provides substantial detail as to why  
CP/M does not actually have an Int-21 mechanism. Mr. Hollaar further asserts that “[t]he  
calling of the operating system when a function is required by the application program is

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<sup>10</sup> Included in italics with the alleged defamatory statement are additional relevant portions of the text, which the Court believes are necessary for context. In this case, the additional text includes examples from the “independent examination” described in the text, and the substance of the allegation that Paterson copied Kildall’s first 36 Int-21 functions into QDOS.

certainly not original to Kildall.” See Hollaar Decl., docket no. 20-3, ¶ 14. The substance of Plaintiff’s challenge, however, is merely that the name given to the function list he copied was incorrect (i.e., that Paterson “took almost unaltered Kildall’s [function subroutine] – the heart of his innovation,” as opposed to Kildall’s Int-21 mechanism.). Evans does attribute the “Interrupt 21” functions of DOS to Mr. Kildall, although Kildall had the same functions located within a different mechanism. See Tomkins Decl., docket no. 21, Ex. E. The incorrect detail regarding the “Int-21” label, however, is immaterial. Kildall’s function calls were copied, almost verbatim, by Paterson. See also Tomkins Decl., docket no. 20-2, Ex. E (Kildall Memoir, Appendix B: A Comparison of CP/M and MS-DOS (unpublished)).

The truth of the statement is an absolute defense to a claim of defamation. Ward, 41 Wn.2d at 865. The literal truth of every detail need not be proved: it is sufficient if the statement is substantially true, or the gist of the story, its “sting,” is true. Camer, 45 Wn.App. at 38. On the undisputed facts before the Court, Paterson used CP/M’s function calls, with the similar labels, to ensure translation compatibility and for programmer acceptance. See Response, docket no. 20, at 12:11-15; Paterson Decl., docket no. 20-4, ¶¶ 5, 6. Plaintiff’s contention that CP/M did not have “Interrupt 21” mechanism at a singular detail of the allegation, rather than its substantial truth. The functions in Paterson’s DOS were copied from CP/M, for translation compatibility. Even if Kildall’s CP/M did not have an “Int-21” mechanism, DOS function calls, “the [] commands that allowed the operating system to interact with the application program,” were copied from CP/M. See Hollaar Decl., docket no. 20-3, ¶ 11. The sting of the Kildall chapter with regard to CP/M’s function calls is substantially true, and Evans’ statements are not actionable as defamation.

**e. Statement No. 7.**

Paterson’s file system, Rolander acknowledges, was better for the larger disks, but he adds that mistakes were made in cloning Kildall’s work.

Complaint ¶ 1.4.g. Paterson challenges this statement as defamatory. See id. However, Paterson has explained, for example, that MS-DOS did not implement CP/M function 12

(0Ch) to get the system version number, likely as a result of his reliance on different versions of the CP/M Interface Guide. See Das Decl., docket no. 14, Ex. A (Paterson Dep. at 68:15-69:4). Paterson does not challenge, in Response, Evans' statement that "mistakes were made." Accordingly, the Court finds no false statement or defamatory meaning.

Paterson also takes issue with Evans' characterization of his work as "cloning Kildall's work," claiming defamation. However, as with Evans' allegations that DOS was "Paterson's version" (or "Paterson's adaptation") of CP/M, the statement that Paterson "clon[ed]" CP/M constitutes non-actionable opinion. Plaintiff does not allege that Evans' "cloning" allegation is provably false, and his expert, Lee Hollaar, opines that "[a]s with many terms in computer technology, there is no precise definition of 'clone.'" See Hollaar Decl., docket no. 20-3, at ¶ 27. Given the imprecise nature of the word "clone," and the admitted substantial influence of CP/M on DOS, the Court finds no defamatory meaning in the allegation that Paterson "clon[ed] Kildall's system."<sup>11</sup>

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<sup>11</sup> As an additional basis for his defamation claim, Plaintiff asserts that the Kildall chapter falsely asserts that Kildall could have sued Microsoft: "[t]he obvious question is why Kildall did not sue Microsoft as he was free to do so. \* \* \* The decision not to sue was a disastrous error." See Das Decl., docket no. 14, Ex. B, at 413. Plaintiff alleges that Kildall was not the "nice" person described in the Kildall chapter, and that DRI could not have won its lawsuit against Microsoft, as alleged by persons quoted in the chapter.

"Yeah," says [DRI's Gerry] Davis now, "what we should have done in retrospect was gone in and sued Microsoft very early on, even with the uncertainty in the law, because it would have stopped the development of a competitor. And if we had stopped them to begin with, they would never have gotten the foothold they have."

See id., Ex. B, at 414. Plaintiff alleges the implication that Kildall could have sued is both false and defamatory, because Kildall had "voluntarily waived the right to sue in his agreement with IBM. *See Exhibit D, Contract with IBM.*" Unfortunately, Plaintiff fails to cite the applicable portion of the agreement. However, section (o) of the Agreement between DRI and IBM reads as follows:

VENDOR hereby expressly releases and forever discharges IBM of and from all claims . . . in any way relating to . . . IBM Personal Computer DOS . . . .

See Tomkins Decl., docket no. 21, Ex. D (IBM Contract) at 16. The release of IBM had no effect on DRI's ability to bring a claim against Microsoft – except with regard to its

1           **2.       Fault.**

2           The third element a defamation plaintiff must prove is fault. Mark, 96 Wn.2d 473,  
3 486 (1981). The necessary degree of fault depends on whether a plaintiff is a private  
4 individual or a public figure. Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters,  
5 100 Wn.2d 343, 352 (1983). If the plaintiff is a private individual, a negligence standard of  
6 fault applies. Id. (quoting Taskett v. KING Broadcasting Co., 86 Wn.2d 439, 445 (1976)).  
7 If the plaintiff is a public figure, the plaintiff must prove “actual malice” in order to recover.  
8 Caruso, 100 Wn.2d at 352 (quoting Gertz, 418 U.S. at 342).

9           Actual malice requires proof by “clear and convincing evidence” of “knowledge of the  
10 falsity or reckless disregard of the truth or falsity of the statement.” Id.; Flowers v. Carville,  
11 310 F.3d 1118, 1130 (9th Cir. 2002). The First Amendment defines the boundaries of fault  
12 in an action for defamation involving a public figure. E.g., Masson v. New Yorker  
13 Magazine, Inc., 501 U.S. 496, 499 (1991).

14           **a.       Mr. Paterson as a Limited-Purpose Public Figure.**

15           The parties agree that it is for the Court to determine whether or not Mr. Paterson is a  
16 public figure. See Response, docket no. 20, at 6 (“[w]hether or not a party is a public figure  
17 is a question of law which must be decided by the court”) (citing Wolston v. Reader’s Digest  
18 Ass’n, Inc., 578 F.2d 427, 429 (D.C. Cir. 1978), rev’d on other grounds, 443 U.S. 157  
19 (1979). The Court’s determination regarding whether an individual is a public figure may  
20 rest on either of two alternative bases. First,

21  
22           \_\_\_\_\_ development of IBM PC-DOS. The agreement left open the possibility of suing Microsoft for  
23 MS-DOS.

24                     ... provided, however, that such release and immunity shall not extend to  
25 the offering of similar DOS operating systems to others by such suppliers,  
developers and maintainers.

26           Id. at 18 (emphasis in original). This is consistent with Evans’ averment in the Kildall chapter  
that Kildall had agreed not to sue IBM, “but did not agree to an undertaking to refrain from  
suing Microsoft.” See Das Decl., docket no. 14, Ex. B, at 413.

1 [i]n some instances an individual may achieve such pervasive fame or  
2 notoriety that he becomes a public figure for all purposes and in all  
3 contexts.

4 Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The courts have generally referred to  
5 such persons as “general purpose” public figures. E.g., Harris v. Tomczak, 94 F.R.D. 687,  
6 700 (E.D. Cal. 1982). A “general public figure is a well-known ‘celebrity,’ his name a  
7 ‘household word.’” Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294 (D.C.  
8 Cir. 1980). There is no allegation that Mr. Paterson is a “general purpose” public figure.

9 A “general purpose” public figure is much less common than a “limited purpose”  
10 public figure. The Supreme Court described a limited purpose public figure in Gertz:

11 More commonly, an individual voluntarily injects himself or is drawn  
12 into a particular public controversy and thereby becomes a public figure  
13 for a limited range of issues. In either case such persons assume special  
14 prominence in the resolution of public questions.

15 418 U.S. at 351; accord Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1197 (9th Cir.  
16 1989). “[A] public controversy is one that touches upon serious issues relating to community  
17 values, *historical events*, governmental or political activity, arts, education, or public safety.  
18 Wells v. Liddy, 186 F.3d 505, 540 (4th Cir. 1999) (emphasis added). Defendants allege that  
19 Mr. Paterson is a “limited purpose” public figure for the limited range of issues surrounding  
20 the long-standing controversy regarding the paternity of DOS. Paterson counters that his  
21 actions are insufficient to establish involvement in a “public controversy,” and contends the  
22 dispute regarding CP/M and DOS was only between Kildall and Gates. See Response,  
23 docket no. 20, at 7-8.

24 An individual need not be known outside of his or her particular industry to be a  
25 limited purpose public figure. For example, in Waldbaum v. Fairchild Publications, Inc.,  
26 627 F.2d 1287 (D.C. Cir. 1980), the Court considered a supermarket executive whose  
advocacy for certain policies was known in the industry and reported in trade publications.  
The Court noted that:



1 Those who attempt to affect the result of a particular controversy have  
2 assumed the risk that the press, in covering the controversy, will  
examine the major participants with a critical eye.

3 Id. at 1298. The Court found that the supermarket executive was a limited purpose public  
4 figure with respect to public controversy surrounding the viability of precedent-breaking  
5 policies, and the allegation that his leadership resulted in losses to the supermarket  
6 cooperative and his ultimate dismissal. Id. at 1299 (“public controversies existed over the  
7 viability of cooperatives as a form of commercial enterprise and over the wisdom of various  
8 policies that Greenbelt in particular was pioneering.”). The Court’s analysis of whether a  
9 public controversy actually existed is instructive:

10 To determine whether a controversy indeed existed and, if so, to define  
11 its contours, the judge must examine whether persons actually were  
12 discussing some specific question. A general concern or interest will  
13 not suffice. The court can see if the press was covering the debate,  
14 reporting what people were saying and uncovering facts and theories to  
15 help the public formulate some judgment. It should ask whether a  
reasonable person would have expected persons beyond the immediate  
participants in the dispute to feel the impact of its resolution. *If the  
issue was being debated publicly and if it had foreseeable and  
substantial ramifications for nonparticipants, it was a public  
controversy.*

16 Id. at 1297. The Court in Daniel Goldreyer, Ltd. v. Dow Jones & Co., Inc., 259 A.D.2d 353  
17 (N.Y.A.D. 1999) reached a similar result with regard to an art restorer, “controversial and  
18 well-known in the profession, but not outside of it.” The Court found the plaintiff was an  
19 “involuntary limited purpose public figure” based on the public controversy surrounding “his  
20 use of certain questionable techniques in the restoration of a valuable painting for a Dutch  
21 museum.” Id. at 353. The Court concluded that the plaintiff must prove “that a reasonable  
22 jury might find that actual malice ha[s] been shown with convincing clarity.” Id. at 353-54.

23 Paterson urges the Court to conclude that his public involvement in the controversy  
24 amounts to “a couple of articles in trade journals that refer to Mr. Paterson’s role in the  
25 development of DOS,” and “one letter to the editor where Mr. Paterson takes issue with  
26 Kildall’s characterization of his work as derivative.” See Response, docket no. 20, at 8.

1 However, the scope of the public controversy was extensive, as was Paterson's involvement.  
2 Infoworld's comment that IBM's operating system would "be similar to CP/M in many  
3 respects" was perhaps the first comparison of similarities between the operating systems.  
4 See Das Decl., docket no. 14, Ex. S. Kildall's phone call to Paterson, accusing him of  
5 "ripping off" CP/M, see id., Ex. G at 184, followed popular, public recognition of  
6 similarities between the two operating systems. DOS was "a CP/M-look-alike operating  
7 system." Id., Ex. U (Kevin Strehlo, Microsoft Expands, Weighs Dependence Against  
8 Autonomy, PC Week, Sept. 1984). Paterson also provided commentary on his reliance on  
9 CP/M during the creation of DOS. Id., Ex. L (David Hunter, Tim Paterson: The Roots of  
10 Dos, Softalk for the IBM Computer, March 1983 ("Step one was to write down what  
11 CP/M-80 did.")).

12 Public controversy grew with articles and statements following Kildall's death in  
13 1994. John Wharton wrote a tribute to Kildall in Microprocessor Report, to which Mr.  
14 Paterson responded with a lengthy, substantive letter to the editor. See Das Decl., docket no.  
15 14, Ex. J (Tim Paterson, The Origins of DOS: DOS Creator Gives His View of Relationship  
16 Between CP/M, MS-DOS, Microprocessor Report, Oct. 3, 1994, Letter to the Editor).  
17 Paterson disputed Wharton's "characterization" of DOS as "an unauthorized 'quick and  
18 dirty' knockoff of CP/M from Seattle Computer Products." Id. Although not directly  
19 disputing that DOS was a knockoff of CP/M, Paterson explained that CP/M-86 was  
20 unavailable, and that Seattle Computer Products was in desperate need of software for Intel's  
21 8086. Id. Paterson explained that the interface used by applications (to make it as easy as  
22 possible for developers) would necessarily be the same:

23 In other words, the interface used by applications to request operating  
24 system services would be exactly the same as CP/M's after applying the  
translation rules.

25 Id. Paterson conceded that he copied application-visible elements from CP/M, and that he  
26 relied upon the CP/M Interface Guide in writing DOS:

1 So 86-DOS generally had all the same application-visible elements as  
2 CP/M—the function codes, the entry point address, part of the File  
3 Control Block layout, etc. I used the 1976 CP/M Interface Guide for  
4 my description of the requirements. I also provided some similar  
5 commands from the console such as DIR, RENAME, ERASE--although  
6 any system would have such functions, regardless of name chosen.

7 Id. Paterson set forth his version of events relating to the creation of DOS in the letter, and  
8 then in closing directed readers to books for which Paterson had provided interviews, Gates  
9 and Hard Drive. See Das Decl., docket no. 14, Ex. G, H (James Wallace & Jim Erickson,  
10 Hard Drive: Bill Gates and the Making of the Microsoft Empire (John Wiley & Sons, Inc.  
11 1992)) (Stephen Manes & Paul Andrews, Gates: How Microsoft's Mogul Reinvented an  
12 Industry-and Made Himself the Richest Man in America (Doubleday 1993)).

13 In Hard Drive, Paterson told of a telephone confrontation with Kildall, in which he  
14 accused Paterson of “ripping off” CP/M:

15 “At the time,” said Paterson, “I told him I didn’t copy anything. I just  
16 took his printed documentation and did something that did the same  
17 thing. That’s not by any stretch violating any kind of intellectual  
18 property laws. Making the recipe in the book does not violate the  
19 copyright on the recipe. I’d be happy to debate this in front of anybody,  
20 any judge.”

21 See Das Decl., docket no. 14, Ex. G at 184.

22 In other publications, Paterson defended his authorship of DOS from Kildall’s  
23 persistent allegations of copying, including an article written for the “Encyclopedia of  
24 Computers and Computer History.” See id., Ex. EE. In writing this article, Mr. Paterson  
25 admits his goal was to address the continuing controversy whether QDOS was a “clone” or  
26 “rip off” of CP/M, “thinking if I explain it, you know, fully and in detail people will  
understand.” Id., Ex. A (Paterson Dep. 224:20-225:7).

27 Paterson has written articles for Byte Magazine, and authored other articles on the  
28 origins of DOS. He has made himself available for interview since the early 1980s, and  
29 maintains a collection of articles by him, and about him, on his web site. See Johnson Decl.,  
30 docket no. 23-2, Ex. A (Paterson Dep. at 73-74). Paterson actively sought to influence

1 public perception of himself and his authorship of DOS. Having voluntarily injected himself  
 2 into the public controversy surrounding the paternity of DOS, Tim Paterson is a limited  
 3 purpose public figure.<sup>12</sup>

4 **b. Actual Malice.**

5 A public figure defamation plaintiff must prove, with evidence of “convincing  
 6 clarity,” that the defendant published false and defamatory statements with *actual malice*.  
 7 E.g., Curtis Publ’g Co. v. Butts, 388 U.S. 130, 155 (1967); see also Flowers v. Carville, 310  
 8 F.3d 1118, 1130 (9th Cir. 2002) (Actual malice “must be satisfied by clear and convincing  
 9 evidence . . .”). Paterson concedes that a limited purpose public figure must prove actual  
 10 malice at trial. See Response, docket no. 20, at 22.<sup>13</sup>

11 Actual malice is a subjective standard, turning on the defendant’s state of mind.  
 12 Flowers, 310 F.3d at 1131. Actual malice means the publication was made “with knowledge  
 13 it was false or with reckless disregard of whether it was false or not.” New York Times Co.  
 14 v. Sullivan, 376 U.S. 254, 279-80 (1964); see also Hoppe, 53 Wn.App. at 676 (“To prove  
 15 actual malice, a plaintiff usually must establish that the declarant knew the expression was  
 16 false, acted with a high degree of awareness of its probable falsity, or in fact entertained  
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18 <sup>12</sup> Mr. Paterson cites only one case in connection with the issue of a limited purpose  
 19 public figure, and urges the Court to apply the four-part limited purpose public figure test set  
 20 forth in Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123, 136-37 (2d Cir. 1984). Under  
 21 Lerman, a defendant must show a plaintiff has (1) successfully invited public attention to his  
 22 views in an effort to influence others prior to the incident that is the subject of litigation; (2)  
 23 voluntarily injected himself into a public controversy related to the subject of the litigation; (3)  
 24 assumed a position of prominence in the public controversy; and (4) maintained regular and  
 continuing access to the media. Mr. Paterson’s role in the controversy surrounding DOS meets  
 and exceeds each of the elements under Lerman. Over a period of decades, Paterson has invited  
 the public to consider his viewpoint, as the “father of DOS.” He has maintained regular access  
 to the media, and has publically disputed any questioning of the relationship between DOS and  
 CP/M. Mr. Paterson is a limited purpose public figure under any formulation of the test.

25 <sup>13</sup> Plaintiff cites RCW 9.58.020 in a footnote, noting that publications falling within the  
 26 criminal statute are “deemed malicious unless justified or excused.” See Response, docket no.  
 20, at 22 n.3. However, the criminal libel statute has “no relation whatever to a civil action for  
 damages.” Tolan v. Washington, 2005 WL 1378755 (W.D. Wash. 2005) (quoting Enright v.  
Bringgold, 106 Wn. 233 (1919)).

serious doubts as to the statement's truth."); accord Harris v. City of Seattle, 315 F. Supp. 2d 1105, 1110 (2004).

Reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication."

Harris, 315 F. Supp. 2d at 1110 (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

The plaintiff must prove actual malice by clear and convincing evidence. Id. Actual malice can be proven only through "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant, 390 U.S. at 731 (1968). At summary judgment in a public figure defamation proceeding, the Court must consider whether there is evidence to support a finding of actual malice. Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1134-35 (9th Cir. 2003).

Paterson argues that "[h]e need not prove [actual malice] to survive summary judgment," citing Demopolis v. Peoples Nat. Bank of Washington, 59 Wn.App. 105, 117 (1990). Plaintiff's reliance on Demopolis is misplaced. In Demopolis, at the conclusion of plaintiff's case, the trial court held actual malice was a question of fact for the jury.<sup>14</sup> Nevertheless, the court dismissed the case, ruling that Demopolis had failed to meet his burden on two elements: an unprivileged communication, and damages. The Washington Court of Appeals held dismissal of the defamation claim for failure to prove damages was error. In fact, the defendant had not even assigned error to the court's finding that actual malice presented a triable issue of fact for the jury.

The heavy burden of clear and convincing evidence of actual malice "is imposed at the summary judgment stage as well as at trial. Herron, 108 Wn.2d at 170. At the summary

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<sup>14</sup> Demopolis brought his defamation claim after an attorney for People's National Bank, Mr. James Hermesen, allegedly stated the he was going to "nail" Demopolis for \$150,000 in attorney fees, because Demopolis had been "convicted of perjury." It was undisputed that Demopolis has never been charged with, nor convicted of, perjury.

1 judgment stage, the plaintiff must offer evidence that “could support a reasonable jury  
2 finding . . . that the plaintiff has shown actual malice by clear and convincing evidence.”

3 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986).

4 Defendants urge that Paterson cannot prove actual malice because the Kildall chapter  
5 merely repeated the widely held consensus that QDOS and MS-DOS were clones of CP/M.  
6 Defendants note that Mr. Evans, as explained at his deposition, relied on his research and  
7 believed he was merely “reporting from the industry.” See Das Decl., docket no. 14, Ex. HH  
8 (Evans Dep. 154:24-25). Evans further stated that the Kildall chapter merely “recapitulate[d]  
9 and state[d] what eleven, twelve, fifteen other books [said] and there [was] no public outcry,  
10 no public corrections, no website corrections, no criticism in reviews [that any of the  
11 accounts were erroneous.]” See id. Ex. HH (Evans Dep. 114:4-114:21). Paterson counters  
12 that actual malice may be found where a defendant consciously avoids discovering the truth  
13 as it relates to defamatory allegations, and urges that Evans consciously avoided learning the  
14 truth about the relationship between DOS and CP/M. See, e.g., Harte-Hank Communications  
15 v. Connaughton, 491 U.S. 657, 667 (1989).

16 Harte-Hank considered factors which might indicate a conscious disregard for the  
17 truth, including the disregard of statements supporting the plaintiff’s position, concerns with  
18 the veracity of statements relied upon, and the failure to interview witnesses and review  
19 available information. See id. at 691-92. Notably, however, the mere failure to investigate is  
20 not actual malice. See Herron, 108 Wn.2d at 171 (affirming summary judgment in favor of  
21 newspaper that reprinted recall petition charges without performing an independent  
22 investigation). To prove actual malice, a plaintiff usually must establish that the declarant  
23 knew the expression was false, acted with a high degree of awareness of its probable falsity,  
24 or in fact entertained serious doubts as to the statement’s truth. Margoles v. Hubbard, 111  
25 Wash.2d 195, 202 (1988) (finding no actual malice regarding newspaper statement regarding  
26

1 improper use of port vehicle, where the port manager admitted to a warning, after one  
2 incident, not to make unauthorized use of vehicle).

3 In nineteen bullet points, Paterson cites evidence in support of his allegation that  
4 “Evans . . . either knew of the falsity of the statements he made, or consciously avoided  
5 discovering the truth.” Response, docket no. 20, at 24-27. Unfortunately, the information  
6 cited is largely unrelated to Paterson, or is not probative of the controversy in this case. The  
7 topics relate to, *inter alia*:

- 8 ■ IBM’s choice of MS-DOS over CP/M;
- 9 ■ pricing of CP/M;
- 10 ■ influence of the DEC PDP-10 on CP/M;
- 11 ■ Gates’ knowledge of the extent of the similarities between CP/M and MS-  
12 DOS;
- 13 ■ the reliability of Kildall’s manuscript;
- 14 ■ Kildall’s ability to sue;
- 15 ■ similarity of the functions of MS-DOS and CP/M;
- 16 ■ important differences between CP/M and DOS;
- 17 ■ “excuse[s]” for why the operating systems were similar;
- 18 ■ Kildall’s contention that CP/M and 86-DOS had the same code;
- 19 ■ Kildall’s GEM operating system;
- 20 ■ the contract between DRI and IBM;
- 21 ■ Kildall’s bitterness and animosity toward Gates; and
- 22 ■ Evans failure to interview Tim Paterson.

23 Response, docket no. 20, at 24-27. In spite of the collection of facts cited by Mr. Paterson,  
24 there is little, if any, evidence which bears on the question of actual malice, or Evans’  
25 knowledge of the falsity of any statements included in the Kildall chapter.

26 For example, the first bullet relates to IBM’s choice of MS-DOS over CP/M. Id. at  
24. However, IBM’s choice of MS-DOS may be relevant to the Kildall chapter, but it is



1 wholly unrelated to whether Paterson, in fact, “cloned” or “copied” CP/M, or with whether  
2 Evans acted with actual malice. Similarly, the second bullet relates CP/M pricing, theorizing  
3 that Kildall was responsible for the disastrously high price of CP/M. Id. at 24. However, the  
4 price of CP/M may be relevant to the eventual failure of CP/M, but is in no way relevant to  
5 whether Paterson copied CP/M or was defamed by Evans’ book. The remaining bullets  
6 consider allegedly bad things Kildall may have done, the merits of other lawsuits and charges  
7 against him, and whether Kildall was an alcoholic. Indeed, the main point of these facts  
8 seems to be that Kildall wasn’t such a great person, and therefore the Evans’ chapter shows a  
9 reckless disregard for the truth because he lionizes Kildall.

10 Evans’ consideration of different facts and viewpoints, or his failure to discuss  
11 Kildall’s business disputes or personal problems (which came years later), is simply  
12 irrelevant to whether Evans’ chapter is inaccurate or defamatory, or whether Evans had  
13 doubts about its accuracy at the time of publishing. Plaintiffs fail to provide *any* evidence  
14 regarding “serious doubts” about the accuracy of the Kildall chapter. Instead, a careful  
15 review of the Lefer notes, Tomkins Decl., docket no. 20-2, Ex. C, provides a research picture  
16 tellingly close to the substance of the final chapter.

17 Plaintiff’s final allegation, described as “most telling of all,” is Evans’ failure to  
18 interview Paterson. However, the mere failure to investigate is not actual malice. See  
19 Herron v. Tribune Pub. Co., Inc., 108 Wn.2d 162, 171 (1987) (actual malice is not proved by  
20 showing that the publisher failed to investigate the basis for his statements or that a more  
21 prudent person would have refrained from such publications); Parry v. George H. Brown &  
22 Associates, Inc., 46 Wn.App. 193, 197 (1986) (actual malice is not shown by failure to  
23 investigate); DARE America v. Rolling Stone Magazine, 101 F. Supp.2d 1270, 1284 n.3  
24 (C.D. Cal. 2000) (defendants not required to contact subjects of the article before  
25 publication), aff’d, 270 F.3d 793 (9th Cir. 2001). Coupled with additional evidence,  
26 however, the failure to investigate, negligence, anger or hostility toward plaintiff, and

1 reliance on sources known to be unreliable, could cumulatively be sufficient to establish a  
 2 clear and convincing inference of actual malice. Herron, 108 Wn.2d at 172. However, in  
 3 this case Plaintiff fails to demonstrate even a failure to investigate. Paterson's position in the  
 4 public controversy was published in numerous places and has not changed in this litigation.

5 Defendant urges that consulting with Paterson would have changed nothing. See  
 6 Reply, docket no. 22, at 11. His interviews and publications set forth a defense to the  
 7 cloning charges, i.e., that "translation compatibility" and programmer acceptance dictated his  
 8 design choice to copy CP/M's function calls. See Paterson Decl., docket no. 20-4, ¶¶ 5, 6.  
 9 The failure to interview Mr. Paterson is not probative of actual malice, in this case.

10 Herron considered a series of editorials which reprinted charges contained in a recall  
 11 petition against Pierce County Prosecutor Don Herron. 108 Wn.2d at 162. The principal  
 12 issue was the question of actual malice. Herron noted that the "clear and convincing  
 13 evidence" standard was imposed at the summary judgment, as well as trial, and that the  
 14 plaintiff must offer "evidence sufficient to permit a reasonable trier of fact to find clear and  
 15 convincing proof of actual malice." Id. at 169-70. The Court noted that

16 although negligence, a failure to investigate, anger or hostility towards  
 17 the plaintiff, or reliance on sources known to be unreliable would each  
 18 alone be insufficient proof, when viewed cumulatively and in  
 appropriate circumstances they may establish a clear and convincing  
 inference of actual malice.

19 Id. at 172 (citing Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir.1969)). However, in  
 20 spite of a broad attack on the recall charges, the Supreme Court found clear and convincing  
 21 evidence of actual malice only where the reporter had actually been present during a hearing  
 22 which was the subject of one of the recall charges. Id. at 173-74.<sup>15</sup> In powerful language,  
 23 Herron noted the limits on a public figure defamation plaintiff:

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 25 <sup>15</sup> The charge was that a sentencing judge had not been informed of the full extent of  
 26 defendant's drug-manufacturing operations, resulting in a relatively short 60-day sentence.  
 Plaintiff noted the judge had been fully informed, and that the reporter had been present at the  
 hearing. There was no evidence refuting the assertion that the judge had been fully informed  
 of the extent of the defendant's activities.

Thus, the public figure's critics have no affirmative duty to search out the truth or to substantiate their statements, nor are they required to corroborate their sources' information. The only limitation on free expression is liability imposed for false and damaging statements made with actual knowledge of or in reckless disregard of their falsity.

Id. at 171 (citing Garrison v. State of La., 379 U.S. 64, 79 (1964)).

Relevant to the actual malice inquiry is the "sting" of the Kildall chapter. Although the facts presented and discussed in the chapter could be viewed differently (i.e., in a light more favorable to Paterson), the Kildall chapter – as written – is not probably false. Paterson fails to cite evidence probative of actual malice. There is no evidence of a reckless disregard for the truth, and there is no evidence Evans "in fact entertained serious doubts as to the truth of his publication." See St. Amant, 390 U.S. at 731. There is insufficient evidence to establish with "convincing clarity" or by "clear and convincing proof" that Mr. Evans acted with actual malice. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 773 (1986). As a limited purpose public figure, Mr. Paterson's defamation claims require clear and convincing proof of actual malice. Because Mr. Paterson has presented no such evidence, summary judgment for the Defendants is appropriate on all claims.

#### **B. False Light**

In addition to his claim for defamation, Paterson asserts a claim for false light invasion of privacy. A false light claim arises when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed. Eastwood v. Cascade Broadcasting Co., 106 Wn.2d 466, 470-71 (1986) (citing Restatement (Second) of Torts § 652E (1977)).

The theoretical difference between [defamation and false light] is that a defamation action is primarily concerned with compensating the injured party for damage to reputation, while an invasion of privacy action is primarily concerned with compensating for injured feelings or mental suffering. The two torts overlap, however, when the statement complained of is both false and defamatory. In such a case the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.

1 Id. at 470. A plaintiff need not be defamed to bring a false light action:

2           It is enough that he is given unreasonable and highly objectionable  
3           publicity that attributes to him characteristics, conduct or beliefs that are  
4           false, and so is placed before the public in a false position. When this is  
5           the case and the matter attributed to the plaintiff is not defamatory, the  
6           rule here stated affords a different remedy, not available in an action for  
7           defamation.

8 Id. (citing Restatement (Second) of Torts § 652E, cmt. b.).

9           However, a public figure plaintiff cannot recover on a false light claim unless he or  
10          she can prove the defendant acted with actual malice. See Hoppe, 53 Wn.App. at 677.

### 11           **1. Actual Malice**

12          Defendants urge the Court to dismiss Plaintiff's false light claim because Plaintiff has  
13          failed to provide evidence of actual malice. See, e.g., Flowers, 310 F.3d at 1132 ("[J]ust like  
14          public figure defamation, [false light invasion of privacy] requires actual malice – knowing  
15          or reckless disregard of the truth."); see also Hoppe, 53 Wn.App. at 677 (citing Hustler  
16          Magazine v. Falwell, 485 U.S. 46, 52 (1988)).

17           [E]ven though falsehoods have little value in and of themselves, they are  
18           nevertheless inevitable in free debate, and a rule that would impose  
19           strict liability on a publisher for false factual assertions would have an  
20           undoubted chilling effect on speech relating to public figures that does  
21           have constitutional value. Freedoms of expression require breathing  
22           space. This breathing space is provided by a constitutional rule that  
23           allows public figures to recover for libel or defamation only when they  
24           can prove both that the statement was false and that the statement was  
25           made with the requisite level of culpability.

26          Falwell, 485 U.S. at 52. Because Paterson is a limited purpose public figure, Evans'  
commentary is subject to the protections of the First Amendment. Flowers, 310 F.3d at  
1132. The Court therefore dismisses Mr. Paterson's claim for false light invasion of privacy  
because he fails to provide any evidence that Evans acted with actual malice.

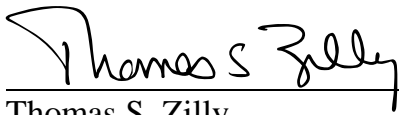
### 27           **CONCLUSION**

28          The Court GRANTS the Defendants' Motion for Summary Judgment, docket no. 13.  
29          Plaintiff Tim Paterson has failed to provide evidence that statements in Sir Harold Evans'  
30          chapter on Gary Kildall are provably false or defamatory. The statements in the Kildall

1 chapter constitute non-actionable opinion protected by the First Amendment, or statements  
2 that are not provably false. In addition, as a limited purpose figure Mr. Paterson has failed to  
3 provide any evidence that Sir Harold Evans acted with actual malice. The Court grants the  
4 Defendants' Motion for Summary Judgment, docket no. 13, on each of Plaintiff's claims.

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6 IT IS SO ORDERED.

7 DATED this 25th day of July, 2007.

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10 Thomas S. Zilly  
11 United States District Judge  
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